SUPREME COURT OF KENTUCKY
CASE NO. 2018-SC-000523-DE
(2018-CA-000088)

COMMONWEALTH OF KENTUCKY **APPELLANT**
CABINET FOR HEALTH AND FAMILY SERVICES ET AL

v.

KENTON CIRCUIT COURT, FAMILY DIVISION 5
ACTION NO. 17-AD-00116

K.S., MOTHER **APPELLEE**

BRIEF OF APPELLANT

RESPECTFULLY SUBMITTED,

Abigail E. Voelker (# 91499)
130 West 43rd ST
Covington, KY 41015
(859) 292-6340 x 2590
Counsel for Appellant

CERTIFICATE OF SERVICE

Pursuant to CR 76.12 and in accord with CR 5.03, the undersigned does hereby certify that the original and ten copies of the Appellant's brief was filed on the 6th day of March 2019, and mailed via first class, postage prepaid, to the Kentucky Supreme Court, Clerk's Office, 700 Capital Avenue, #209, Frankfort, KY 40601 and one true and accurate copy was served via first class, postage prepaid to the Hon. Sam Givens, Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Dawn Gentry, Judge, Kenton Circuit Court, Family Division Five, 230 Madison Avenue, Covington, Kentucky 41011; Hon. George A. Thompson, Attorney for Appellant, 214 East 4th St., Covington, KY 41011, Hon. Justin Durstock; Attorney for the Respondent Father, 2216 Dixie Hwy, Suite 202, Ft. Mitchell, KY 41017; Hon. J Richard Scott, Guardian Ad Litem, 517 Madison Ave., Covington, KY 41011 on this the 25th of April 2018. The undersigned also certifies that the record on appeal was not withdrawn from the Office of the Clerk of the Trial Court by the Appellant.

Abigail E. Voelker (#91499)

INTRODUCTION

This is a termination of parental rights case in which the Appellant, Cabinet for Health and Family Services, Commonwealth of Kentucky ("Cabinet") appeals form an opinion vacating a remanding a judgment of the Kenton Circuit Court, Family Division Five (5), terminating the parental rights of the Appellee K.S. to her minor son, A.W.S.

STATEMENT CONCERNING ORAL ARGUMENTS

It is the position of the Appellant that Oral Arguments would be beneficial to this Court. The principal issue on appeal concerns whether the Court of Appeals erroneously reversed the trial court's judgment terminating the parental rights of the Appellee, K.S., based upon it's misconstruction of KRS 600.020 to eliminate risk of harm as a basis for child abuse or neglect and to insert an element of intent in contradiction to the plain language of the law.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Appellant, Commonwealth of Kentucky, Cabinet for Health and Family Services (hereinafter "the Cabinet"), filed a Petition for Involuntary Termination of Parental Rights against the Appellee, K.M.S. Said Petition was filed by the Appellant on June 16, 2017. Trial was held on December 5, 2017 and the matter was submitted to the trial court on that same date. The evidence presented at the trial of this action, in pertinent part, includes the following:

K.M.S. is the mother of A.W.S. born on January 6, 2014.[1] The underlying juvenile action was commenced upon the birth of the child when Appellee told the hospital she could not care for the child.[2] It appeared Appellee was not grasping the concept of caring for the minor child, lacking the ability to perform even the most basic childcare tasks.[3] Additionally, Appellee did not have appropriate housing to care for the child, as she resided with her parents in a filthy apartment, not suitable for any child.[4] There were ongoing concerns of roaches and bedbugs in the home, as well as the presence of Appellee's brother who has prior abuse allegations against him.[5] The child entered foster care on January 13, 2014 at the age of 6 days old, where he has remained for his lifetime.[6]

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[1] Cabinet Trial Exhibit 1.
[2] Court Findings of Fact, Page 2, #7.
[3] Id.
[4] V.R. 12-5-17; 1:39:55
[5] V.R. 12-5-17; 1:39:59
[6] Id., Page 2, #6

At trial, Dr. James Rosenthal, a Qualified Mental Health Professional, testified that Appellee previously was diagnosed with and treated for Autism and Depression.[7] Dr. Rosenthal also diagnosed her with a Pervasive Developmental Disorder and Mild Mental Retardation.[8] Dr. Rosenthal asserted that A.W.S. would be at risk of abuse or neglect if returned to the Appellee's care.[9] He further concluded that the stress of caring for a child would only further impair the Appellee's ability to provide appropriately for her son and would, ultimately, increase the risk of abuse or neglect.[10] Dr. Rosenthal explained that, due to her age, the intellectual abilities of Appellee are not expected to improve, even with additional treatment services.[11] He testified that Appellee is unlikely to improve to a degree permitting her adequate care and protection for her child.[12] There are simply no services that would abate the concerns for this Appellee's further abuse or neglect of this child.[13] Dr. Rosenthal testified that, at best, the Appellee could learn some skills that would better enable her to care for herself.[14]

Cabinet social worker, Kevin Minch testified that the Cabinet took custody of A.W.S. at his birth because the hospital expressed concerns about Appellee's ability

[7] V.R. 12-5-17; 1:09:17
[8] V.R. 12-5-17; 1:09:47
[9] V.R. 12-5-17; 1:14:35
[10] V.R. 12-5-17; 1:17:57
[11] V.R. 12-5-17; 1:32:15
[12] V.R. 12-5-17; 1:26:40
[13] V.R. 12-5-17; 1:31:45
[14] V.R. 12-5-17; 1:25:00

to care for her child.[15] Mr. Minch observed Appellee's limited cognitive skills and saw no improvement in her parenting skills over the life of this case, resulting in A.W.S. remaining in foster care for over three (3) years at the time the TPR was filed.[16] Mr. Minch offered Appellee many services, but none ultimately could correct Appellee's cognitive impairments.[17]

Appellee has not paid any support on behalf of A.W.S. or shown an ability to provide care for the child.[18] She never offered to pay child support.[19] She brought snacks to visits, but provided nothing else for her son's daily care.[20] For the entirety of the underlying juvenile case, the Appellee lacked appropriate housing for herself and her child.[21] Throughout that period, she continued to live in a filthy, bug-infested home that lacked ample food.[22] Four (4) years after A.W.S.'s placement in foster care, the Appellee finally procured more appropriate housing by renting a new apartment a few short weeks before the TPR trial.[23] Despite this, there remained concerns about her ability to maintain this housing.

Appellee's visits with the child have remained supervised at the Cabinet Office. Appellee was offered a visit at her new apartment, but she cancelled that visit

[15] V.R. 12-5-17; 1:38:18
[16] V.R. 12-5-17; 1:48:00
[17] V.R. 12-5-17; 1:53:13
[18] V.R. 12-5-17 2:10:55
[19] Id.
[20] Id.
[21] V.R. 12-5-17; 2:13:25
[22] V.R. 12-5-17; 2:41:04
[23] V.R. 12-5-17; 1:48:37, 2:13:25

due to lack of food in the home.[24] Mr. Minch described the parent/child interactions during visits as playful, lacking any true parenting of the child.[25]

A.W.S. also has cognitive impairments, which necessitate a heightened level of care that Appellee appears incapable of providing.[26] The child has developmental delays, which require ongoing medical treatment and therapies.[27] He is very bonded to his foster family, where all of his medical needs are being addressed.[28] While the Appellee may certainly love her child, she remains unable to provide the ongoing care he requires.

The trial court ruled the child was neglected pursuant to Kentucky Revised Statute (KRS) 600.020 because Appellee failed to make sufficient progress toward identified goals and the child remained in foster care more than three (3) years prior to the filing of the petition for TPR.[29] (Appendix, Attachment 1) The trial court further ruled that Appellee failed or was substantially incapable of providing essential parental care and protection for the child and there is no reasonable expectation of improvement.[30] Last, the trial court ruled that K.M.S. failed to provide or was incapable of providing essential food, clothing, shelter, medical care

[24] V.R. 12-5-17; 1:49:35
[25] V.R. 12-5-17; 2:53:50
[26] V.R. 12-5-17; 2:25:45
[27] V.R. 12-5-17; 2:25:48
[28] V.R. 12-5-17; 2:27:22
[29] Court Findings of Fact, Page 4
[30] Id.

or education reasonably necessary and that there is no expectation of significant improvement.[31]

Each of the Trial Court's findings were supported by the evidence provided by Dr. Rosenthal concerning Appellee's cognitive limitations, as well as the testimony from cabinet worker Kevin Minch. Moreover, Appellee's progress was minimal over multiple years, and she never managed to achieve more than supervised visitation at the Cabinet office. Appellee failed to show an ability to provide for A.W.S. and after *four* (4) years, the same concerns that were present when the child was born still remained. A.W.S. remains at great risk of abuse or neglect if returned to the Appellee. These facts, supported by ample evidence at trial, were the basis for the trial court's finding of neglect and decision to terminate Appellee's parental rights.

Appellee appealed the trial court's decision and the Kentucky Court of Appeals reversed and remanded the matter for additional services to the mother. In its opinion, the Court of Appeals concluded there was insufficient evidence to show the child was neglected. (Appendix Attachment 2, at p. 15). The Appellant Cabinet filed a motion for discretionary review which was granted by the Court on February 7, 2019.

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[31] Id.

ARGUMENT

I. RISK OF HARM IS A BASIS FOR CHILD ABUSE OR NEGLECT; A PARENT MUST NOT FIRST HAVE AN OPPORTUNITY TO PARENT THE CHILD.

The Kentucky General Assembly defined child abuse or neglect to include, in pertinent part, ". . . a child whose health or welfare is harmed or threatened with harm when his parent, guardian, or other person exercising custodial control or supervision of the child . . . (2) Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means[.]"[32] Said definition expressly allows that a reasonably foreseeable *risk* of harm to a child is sufficient to result in an abuse or neglect finding; a court need not wait for the child to suffer actual physical or emotional harm in order to find he has been abused or neglected and to trigger the protective apparatus of the state. This court has specifically found that the family court does not have to wait for "actual harm" to occur by affording the opportunity to parent.[33] Requiring this opportunity to parent the child places children in undue and, sometimes, grave danger.

First, the Court of Appeals incorrectly asserted the Appellee "never had the opportunity to parent the child." The Appellee exercised custody and control upon birth of the child when she place him at risk of harm, as evidenced by the hospital's

[32] KRS 600.020(1).
[33] Com., Cabinet for Health and Family Services on behalf of C.R. v. C.B., 556 SW.3d 568 (2018).

immediate concern for the child. She continued to receive the opportunity to parent at visits, which remained supervised. Appellee's ongoing cognitive delays place A.W.S. at a continued risk for future harm, should he be returned to his mother's care. Despite Appellee's acceptance of services, testimony indicated an inability to meet the most basic needs of the child or to provide the necessary level of protection. The potential risks for child abuse or neglect from the conditions described cannot be overstated, especially given the child's own developmental limitations. The child would be at great and imminent risk if placed back in the care of Appellee.

Further, as indicated above, this Court has ruled that an individual need not have "custody or supervision of a child before a finding of abuse or neglect can be made."[34] The Appellee mother in that case argued a lack of evidence the child was neglected because the child had remained committed to the Cabinet the entire time.[35] This court rejected the argument made by Appellant in that case, finding the clear intent of the General Assembly was to "name multiple alternatives in the provision."[36] In other words, KRS 600.020 cites multiple alternatives to "the person exercising custodial control or supervision of the child," meaning that even if the Cabinet had custody of the child, the biological mother could still abuse or neglect the child, per the statute.[37]

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[34] Com. v. CB, supra at *572.
[35] Id.
[36] Id.; citing provision KRS 600.020
[37] Id. at 572.

The evidence cited by the Court of Appeals in support of its finding that A.W.S. is not abused or neglected was that Appellee's developmental disabilities are insufficient to render her behavior as neglectful. The points cited by the Court of Appeals are sympathetic, given Appellee's cognitive limitations, but do not negate the Appellee's ability to abuse or neglect A.W.S. based upon risk of physical or emotional injury. The Court of Appeals analysis would not only render KRS 600.020(1)(a) useless but also would completely undermine the legislative intent that the Cabinet provide preventive services to families in need of such services and would result in dramatic, if not deadly, injuries to many of this state's weakest and most innocent citizens, its children. As this Court stated, "the purpose of the dependency, neglect, and abuse statutes is to provide for the health, safety, and overall wellbeing of the child."[38]

II. INTENT IS NOT A NECESSARY ELEMENT FOR CHILD ABUSE OR NEGLECT.

The Appellate Court's reliance on "intent" when determining a child is neglected or abused is also misplaced, as the plain language of KRS 600.020 (1)(a)(9) does not include an element of intent to cause the harm suffered. Rather, it requires only that a parent "fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child

[38] Id. at 574.

to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months." KRS 600.020 (1)(a)(9).[39]

Congress overwhelmingly passed the Adoption and Safe Families Act of 1997 (AFSA) to expedite the adoption of children in foster care.[40] In response to AFSA, the Kentucky General Assembly made significant changes affecting the termination of parental rights. Specifically, the definition of an abused and neglected child was amended to include a child left to linger in foster care for 15 of the last 22 months.[41] Therefore, KRS 600.020(1)(a)(9), provides:

> An abused or neglected child means a child whose health or welfare is harmed or threatened with harm when his or her parent, guardian, person in position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child fails to make sufficient progress toward identified goals as set forth in the court approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months.

When analyzing a statute, we must interpret statutory language with regard to its common and approved usage.[42] In so doing, we must refer to the language of the statute rather than speculating as to what may have been intended but was not expressed.[43] In other words, a court "may not interpret a statute at variance with

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[39] The statute has been revised to change the amount of time out of care to fifteen (15) of a cumulative forty-eight (48 months).
[40] Cabinet for Families and Children v. G.C.W., 139 S.W.3d 172, 177 (Ky. App. 2004).
[41] Id. at 177.
[42] KRS 446.080.
[43] Commonwealth v. Allen, Ky., 980 S.W.2d 278, 280 (1998).

its stated language."[44] Therefore, any statutory analysis must begin with the plain language of the statute. In so doing, however, our ultimate goal is to implement the intent of the legislature.[45]

Under the plain language of KRS 600.020(1), the intent of the parent is not specified under subsection (a)(9). In fact, under a plain reading of the other subsections of KRS 600.020(1), the intent of the parent is specified. For example, under KRS 600.020(1)(a)(1) and (2), the definition provides that a parent inflicts or creates a risk of physical or emotional injury, *other than by accidental means*. (Emphasis Added). However, under subsection (a)(9), this additional language, *other than by accidental means*, is not included. Therefore, from the plain language of the statute, it is apparent that the legislature did not require an intentional act of the parent in order for the court to find neglect under KRS 600.020(1)(a)(9).

Further, a plain reading of KRS 625.090, or of KRS 600.020(1) to which it refers, does not require that any particular parent be the perpetrator in order for this element to be satisfied.[46] Indeed, this initial element determines only whether or not the child before the court falls within the protected class of children that the

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[44] Id.
[45] Wesley v. Board of Education of Nicholas County, Ky., 403 S.W.2d 28, 29 (1966).
[46] C.E.T. v. Cabinet for Health and Family Services, *supra* at *5.

legislature has determined are entitled to treatment and protection reasonably calculated to improve their condition.[47]

The Court of Appeals previously upheld this analysis of KRS 600.020(1)(a)(9) in A.L. v Cab. For Health and Family Svcs, Com. Of Ky., 2015-CA-844-ME, 2016 WL 447679, (Ky.App. 2016) (unpub), when it found, "If the legislature had intended to include an element of intent in this subsection, it would have done so."[48] The Appellate Court further opined, "the willful or intentional failure to make progress toward plan goals is not necessary to a finding that child is neglected." Id.

The clear intent of the law establishes that a child is abused or neglected when he suffers an extended time in foster care and the parents fail to make progress toward identified treatment goals. Here, Appellee failed to reach the identified goal of safe reunification, as concerns of harm remained present. This Court has recognized the importance of permanency for the child. In Com., Cabinet for Health and Family Services v. T.N.H., 302 S.W.3d 658 (2010), this Court specifically questioned why a child should be left to linger in foster care. While the issue in T.N.H. centered on a juvenile mother, the correlation is consistent. In T.N.H. and the present case, the mothers were neither presently capable of caring for the child,

[47] Id.

[48] This is an unpublished opinion cited pursuant to CR 76.28(4) and a copy is attached.

nor showing improvement in the near future.[49] Just as age and immaturity did not excuse the mother in T.N.H. from parenting her child, the developmental delay of the Appellee should not excuse her.[50] Accordingly, the child is legally afforded the right to permanency.

Despite this well-settled law, the Court of Appeals still demanded a showing of heightened intent for one who has been diagnosed with cognitive disabilities. Such intent is arguably impossible, given her diagnosis of Autism and an IQ in a range consistent with mild retardation. Also, requiring intent of a parent with cognitive delays disregards the child's right to not be harmed.

Lastly, the language in KRS 600.020 required the Cabinet to prove just *one* of the elements contained in its subsections. At a minimum, the overwhelming testimony showed the child had remained in foster care and the Appellee was not able to make sufficient progress. Intent of the Appellee is irrelevant. This child is a neglected child.

III. THE COURT OF APPEALS UNILATERALLY ADDED THE ELEMENT OF INTENT

The Court of Appeal's reliance on "intent" when determining a child is neglected or abused is also misplaced, as the plain language of KRS 600.020

[49] Com., Cab. For Health and Family Svcs v. T.N.H. , 302 S.W.3d 658 (2010)
[50] Id. at 664.

(1)(a)(9) does not include an element of intent. In yet another conflicting opinion, the Court of Appeals, analyzing KRS 600.020(1)(a)(9), asserted, "If the legislature had intended to include an element of intent in this subsection, it would have done so."[51] The Court further opined, "the willful or intentional failure to make progress toward plan goals is not necessary to a finding that child is neglected." *Id.* Even if the Court of Appeals' interpretation of risk of harm is determined constitutionally and legally correct, the clear intent of the law establishes a child is neglected due his extended time in foster care and the parents' failure to make progress toward goals.

Moreover, the Court of Appeals is demanding intent of a person who has been diagnosed with cognitive disabilities. The Respondent was previously diagnosed with Autism and has an IQ in a range consistent with mild retardation. In light of her diagnoses, Appellee might not be able to possess the intent to neglect.

Lastly, the language in KRS 600.020 required the Cabinet to prove just *one* of the elements contained in its subsections. At a minimum, the overwhelming testimony showed the child had remained in care and the Respondent was not able to make sufficient progress. Intent of the Respondent is irrelevant; this child is a neglected child.

[51] A.L. v Cab. For Health and Family Svcs, Com. Of Ky., 2015-CA-844-ME, 2016 WL 447679, (Ky.App. 2016) (unpub).This is an unpublished opinion cited pursuant to CR 76.28(4) and a copy is attached.

IV. THE COURT OF APPEALS ERRONEOUSLY APPLIED A DE NOVO STANDARD OF REVIEW.

The standard of review in a TPR action is confined to the clearly erroneous standard of Kentucky Civil Rule (CR) 52.01, based upon clear and convincing evidence, and the findings of the trial court will not be disturbed unless there exists no substantial evidence in the record to support its findings.[52] The facts in this action contain more than sufficient evidence to support the findings of the trial court, and yet—despite citing the proper civil rule and legal precedents concerning the "clearly erroneous" standard of review—the Court of Appeals substituted their own collective judgment of the evidence in the place of the trial court's judgment in the proper exercise of its discretion. In doing so, the Court of Appeals has not only misapplied the law but it has also carelessly misstated the evidence to justify its erroneous conclusion that the trial court abused its discretion in this action. In D.G.R. v Com., Cabinet for Health and Family Services, 364 S.W.3d 106 (2012), this Court has found that "mere doubt as to the correctness of a finding will not justify its reversal, and appellate courts should not disturb trial court findings that are supported by substantial evidence." Furthermore, "this Court cannot overturn the trial court's decision, which was grounded in the evidence and was the result of an

[52]. M.P.S. vs. Cab't for Human Resources, Ky. App., 979 S.W.2d 114, 116 (1986).

exercise of sound discretion, simply because in disagrees that that court's view of the evidence or might have ruled differently in the first instance."[53]

A. THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT A FINDING OF NEGLECT UNDER KRS 600.020(1).

KRS 600.020(1)(a) provides the definition of an abused or neglected child. Of relevance to this case is KRS 600.020(1)(a)(9), which provides:

> An abused or neglected child means a child whose health or welfare is harmed or threatened with harm when his or her parent, guardian, person in position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child fails to make sufficient progress toward identified goals as set forth in the court approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months.

The Court of Appeals, in its opinion, concluded, "The Cabinet failed to provide substantial evidence that the Child was neglected."[54] At trial, the Cabinet presented extensive evidence for the Family Court to make a finding of Neglect. Testimony showed the Appellee was unsure how to care for a child, including the inability to feed or change the child, and she did not seem to grasp the concept of caring for a child. The Cabinet introduced the eyewitness testimony of Cabinet representative, Kevin Minch, that Appellee was only able to interact with the child in a "playful"

[53] Id. at 115.
[54] Opinion, pp. 15.

mode, rather than provide any genuine parental care, even after years of Cabinet service provision.

At the time of the TPR trial, the Appellee mother had only begun progressing with her independent living. The child had been in care for nearly four (4) years when trial occurred. Contrary to the trial court's finding that the Appellee had failed to make sufficient progress toward identified goals, the Court of Appeals applied a *de novo* standard of review by choosing to believe that the Appellee's contrary testimony adequately proved she had steady improvement.[55]

Additionally, the sufficiency of the evidence proves that A.W.S. was an abused or neglect child within the meaning of KRS 600.020(1). Each ground derives from the risk A.W.S. experienced and would continue to experience in the care of the cognitively delayed Appellee. Kentucky's child abuse statute indicates that a child, such as A.W.S., may be considered an "[a]bused or neglected child" by being at risk of harm when his "health or welfare is … threatened with harm" by a parent who, as in the case *sub judice,* is "incapable of caring for the immediate and ongoing needs of the child[,]"or "fails … to provide essential parental care or protection for the child[,]"; or, who, for no specified reason, does not or cannot provide the child with "adequate care .. [or] supervision."[56]

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[55] Opinion, p. 15.
[56] KRS 600.020(1)(a)(3,4, and8).

As previously outlined within the material facts, *supra,* the Cabinet offered Appellee a multitude of services and the Appellee's cognitive issues remained of concern. The evidence presented at trial indicated that Appellee 's intellectual disability rendered her unable to safely and independently parent A.W.S. or to learn how to do so. It took nearly *four* (4) years for her merely to meet her case plan goal of independent housing. She demonstrated no other progress toward meeting the ultimate case plan goals to reunify with her son. The Appellee's failure to demonstrate any significant improvement in her cognitive abilities placed A.W.S. at a significant risk of abuse or neglect if returned to the Appellee's care. The qualified mental health professional opined that her mental health diagnosis would continue to render Appellee unable to appropriately manage A.W.S.'s development or to meet her own ongoing, basic needs and that Appellee's prognosis was poor. Lastly, Appellee has provided no child support or alternative form of care to meet the child's most basic needs during his four (4) years in foster care.

The Court of Appeals lacked any valid basis to find the trial court's findings of TPR grounds pursuant to KRS 600.020 clearly erroneous. The trial court's conclusions that Appellee "has continuously or repeatedly failed or refused to provide for the petitioner child, [A.W.S.]", and that Appellee "has continuously or repeatedly failed to provide essential food, clothing, shelter, medical care or education reasonably necessary and available for the petitioner child's well-being,"

that there is "no reasonable expectation of improvement in parental care and protection considering the age of the child" and that "the child has remained in foster care for three (3) years and neither parent has made sufficient progress toward identified goals" were based on substantial evidence and, as such, were clearly erroneous.[57]

V. THE REMAINING ELEMENTS OF KRS 625.090 WERE PROVEN BY CLEAR AND CONVINCING EVIDENCE

The Court of Appeals ended its analysis pursuant to KRS 625.090 after erroneously determining neglect was not proven. In doing so, the Court of Appeals failed to determine if the remaining trial court findings were supported by clear and convincing evidence.

A. THERE WAS A SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT A FINDING THAT TERMINATION OF PARENTAL RIGHTS IS IN THE BEST INTEREST OF THE CHILD

"The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that: . . . (b) Termination would be in the best interest of the child."[58] Where it is clear that parents have abused or neglected their child, and that the biological parents are neither currently—nor in the immediately

[57] Findings of Fact and Conclusions of Law, p. 5-6.
[58] KRS 625.090(1)(b).

foreseeable future—likely to be capable of providing their child with a safe and nurturing permanent home, despite the reasonable reunification efforts of the Cabinet, and where the child has done well in foster care, termination of parental rights is in the child's best interest. To conclusively determine the child's best interests, the Circuit Court is required to *consider* six (6) factors. (Emphasis added). The best interest factors enumerated in the statute are for consideration, and therefore proof does not need to be clear and convincing.[59] The four (4) factors applicable to this case are addressed separately below.

1. THE APPELLEE IS UNABLE TO CARE FOR THE MINOR CHILD DUE TO HER ONGOING MENTAL ILLNESS.

As previously detailed herein, the testimony of Dr. Rosenthal, a qualified mental health professional was uncontroverted. Appellee has a pervasive developmental disorder and falls in the mind range for mental retardation.[60] Her IQ score could deviate up or down 5 points, but otherwise her intellectual capacity is stable.[61] This creates a risk of neglect of the child.[62] Even with extra assistance, her skill level will not improve to a level which would alleviate the concern of neglect.[63]

[59] V.S. v. Cabinet for Human Resources, supra.
[60] V.R.; 12-5-17; 1:09:47 and 1:10:50
[61] V.R.; 12-5-17; 1:26:40 – 1:27:45
[62] V.R.; 12-5-17; 1:14:02
[63] V.R.; 12-5-17; 1:32:15

2. THE APPELLEE HAS NOT MADE EFFORTS AND ADJUSTMENTS TO ALLOW FOR A SAFE RETURN OF THE CHILD IN A REASONALE AMOUNT OF TIME

Similar to this case, in C.A.W. v. Cabinet for Health and Family Services, Com., 391 S.W.3d 400 (Ky.App. 2013), the Court found that while the parents had made some positive steps, they were not sufficient adjustments to their circumstances to warrant reunification. Presently, Appellee did complete the tasks asked of her, until most recently refusing services.[64] Unfortunately, she was unable to make appropriate adjustments, considering her pervasive developmental disorder. The child has been in foster care for 4 years and mother is still learning to live independently, having only moved out of her mother's home shortly before the TPR trial.[65]

3. THE CABINET HAS MADE REASONABLE EFFORTS TO REUNITE THE CHILD WITH APPELLEE

Throughout the dependency action, the court found that the Cabinet had made reasonable efforts to reunite the child to the parents.[66] On December 14, 2015, the court waived the Cabinet's obligation to make reasonable efforts to reunite the child with the parents.[67] The Cabinet worked continuously with Appellee in an attempt to reunite her with her child. Appellee did complete some

[64] V.R.; 12/5/2017; 2:23:15
[65] V.R.12/5/2017; 1:57:15
[66] Cabinet Trial Exhibit.#3
[67] V.R.; 12/5/2017; 1:56:06

services, however, she failed to ever make sufficient progress in her case plan goals to even warrant unsupervised visits.

4. THE CHILD'S PHYSICAL, EMOTIONAL, AND MENTAL HEALTH WILL IMPROVE IF TERMINATION IS ORDERED

The child has remained in the same home since his birth.[68] He has developed a strong bond with the foster parents, whom he refers to as "mom" and "dad."[69] The child also has some developmental and requires additional care, as he is nonverbal.[70] The child is receiving services for speech and physical therapy.[71] Termination would create permanency and ensure he continues to receive the services. Moreover, he would remain with the only family he has ever known.

B. THE CABINET PROVED BY CLEAR AND CONVINCING EVIDENCE THAT ONE OR MORE GROUNDS OF KRS 625.090(2) ARE PRESENT

In addition to the requirement that a child be deemed abused or neglected, "[N]o termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds. . ."[72] Those potential grounds include in pertinent part,

> (a) that the parent has abandoned the child for a period of not less than ninety days; (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential

[68] V.R.; 12/5/2017; 2:27:22
[69] V.R.; 12/5/2017; 2:27:22
[70] V.R.; 12/5/2017; 1:53:13
[71] V.R.; 12/5/2017; 2:25:45
[72] KRS 625.090(2).

> parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child; (g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being, and there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child; and (j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.[73]

Appellee, for a period of not less than six months has been substantially incapable of providing essential parental care and protection for the child and there is no reasonable expectation of improvement. Appellee mother's mental health diagnosis, detailed herein, impedes her ability to provide essential parental care or protection.

Appellee, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the children's well-being, and there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the children. Testimony indicated mother's shelter for the vast majority of the child's life was inappropriate.[74] There are also concerns with

[73] KRS 625.090(2)(a)(e)(g) and (j).
[74] V.R.; 12/5/2017/ 2:41:04.

her ability to provide necessary food and clothing for the child since Appellee has never provided care other than some supplies at visits.[75]

Lastly, the child has been in foster care under the responsibility of the Cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights. At the time of the filing, the minor child had remained in foster care for forty-one (41) months.[76]

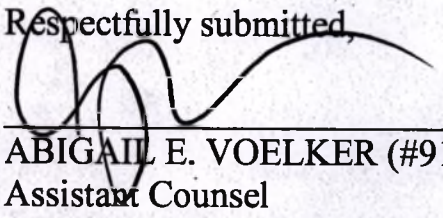
Notably the Family Court needs only to find one basis under the statute to base its determination upon, and here, there were three grounds. Accordingly, there was more than sufficient evidence to support the trial court's finding under KRS 625.090(2).

[75] V.R.; 12/5/2017; 2:10:55
[76] Trial Court Finding #26, Page 5

CONCLUSION

Based upon the foregoing and upon the facts found by the trial court, the Cabinet for Health and Family Services respectfully requests the Court reverse the findings of the Court of Appeals and to uphold the decision of the Kenton Family Court, which involuntary terminated the parental rights of the Appellee to the child subject of this appeal. Alternatively, if this Court fails to reverse the Court of Appeals decision, Appellant hereby requests that the Court of Appeals Opinion in this action at least be amended to "Unpublished."

Respectfully submitted,



ABIGAIL E. VOELKER (#91499)
Assistant Counsel
Cabinet for Health and Family Services
Office of Legal Services
130 West 43rd Street
Covington, Kentucky 41015
Telephone: (859) 292-6340 x 2590
Facsimile: (859) 292-0108
Email: abby.voelker@ky.gov